COMMENT

HOLMES v. SECURITIES INVESTOR PROTECTION CORP.: STANDING TO SUE UNDER SECTION 1964(c) OF RICO FOR THE SECURITIES FRAUD PLAINTIFF

I. INTRODUCTION

In an attempt to eradicate the widespread infiltration of organized crime in the United States, Congress enacted the Organized Crime Control Act of 1970 (the Act).1 The Racketeer Influenced and Corrupt Organizations Act (RICO)2 is one of twelve titles in the Act, created specifically by Congress to stop the infiltration of organized crime into the business sector.3 RICO gives federal courts the power to impose severe criminal penalties upon violators of the Act.4 It also provides


   "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy by unlawful conduct and the illegal use of force, fraud, and corruption ... (3) this money and power are increasingly used to infiltrate and corrupt legitimate business ... and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, ... seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) ... continues to grow because of the defects in the evidence-gathering process ... and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

   It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools[1] ... by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

   Id.


4. Section 1963(a) of RICO provides:

   Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both,

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for a civil cause of action, conferring a right to sue upon "any person injured in his business . . . by reason of a violation of section 1962 . . . ." Although this standing requirement for a civil RICO claim seems straightforward on its face, the federal courts disagree as to the statute's interpretation. To resolve this conflict, the United States Supreme Court addressed the issue of standing under civil RICO in Holmes v. Securities Investor Protection Corp.

In Holmes, the Court granted certiorari in order to decide whether a plaintiff, who alleged a civil RICO claim based on the predicate act of fraud in the sale of securities, needed to satisfy the standing

and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.


6 Id. § 1964(c). Section 1964(c) reads: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Id.

6 Section 1964 is referred to as "civil RICO" because it provides civil remedies, both for the government and private citizens, for violations of RICO. Id. § 1964. Section 1963, on the other hand, is referred to as "criminal RICO" because it provides the criminal sanctions the government can impose on violators of the RICO provisions. Id. § 1963.

7 See infra notes 85-137 and accompanying text.


9 "The term 'predicate acts' is a term of art used to denote the individual acts of racketeering activity that constitute the RICO offense." John L. Koenig, Comment, What Have They Done to CIVIL RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering, 35 AM. U. L. REV. 821, 823 n.6 (1986). The predicate acts upon which RICO claims can be based are listed in § 1961 of RICO under the racketeering activity definition. Section 1961(1) provides, in part:

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year . . . (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . . .

10 Id. § 1964(1) (emphasis added).

11. See Michael N. Glanz, Note, RICO and Securities Fraud: A Workable Limitation, 83 COLUM. L. REV. 1513, 1516-17 (1983). According to Glanz, The [fraud in the sale of securities] provision appears to suggest that almost all securities cases can be brought under RICO. Securities fraud is a general term and is used to characterize most violations of the securities laws. Hence,
requirement of securities law in order to have standing to bring the RICO claim. The securities standing requirement at issue was the purchaser-seller limitation of Rule 10b-5, promulgated under section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act). Rather than deciding whether the plaintiff needed to be a purchaser or a seller, however, the Supreme Court denied standing based on the theory of proximate causation. The Court decided that it was an "inopportune" time to resolve the issue of whether a civil RICO plaintiff needed to satisfy Rule 10b-5's standing requirements. The concurring opinions do shed light, however, on how the purchaser-seller limitation issue would have been decided had the Court addressed the subject.

This comment provides an overview of civil RICO and an examination of section 1964(c)’s standing requirements. Then, to reveal the conflicting interpretations of civil RICO's standing requirements, it reviews the decisions of several circuit courts. This comment then furnishes a thorough analysis of the majority and concurring opinions in Holmes. Finally, it contains an evaluation which discusses the result and effect of Holmes and possible congressional legislation.

II. BACKGROUND

A. Overview of Civil RICO

Section 1964 of RICO provides civil remedies which are de-
signed to further the Act’s goal of eradicating organized crime.\textsuperscript{18} The civil provision of RICO includes the harsh remedy of treble damages.\textsuperscript{19} Civil RICO is aimed at inflicting damage "on the operating capital that allows organized crime to insinuate itself into the lifeblood of legitimate business."\textsuperscript{20} Congress hoped that civil remedies, combined with criminal penalties, would strike "a mortal blow against the property interests of organized crime."\textsuperscript{21}

Although Congress initially enacted RICO to eliminate organized crime in the form of illegitimate business, civil RICO has been used to sue legitimate businessmen.\textsuperscript{22} The expansive use of civil RICO is a result of Congress’ mandate in section 904(a) of the Act which states that "the provisions of [RICO] shall be liberally construed to effectuate restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover treble the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

\textit{Id.}

18. See supra note 1.

[i]nstead of being used against mobsters and organized criminals, [RICO] has become a tool for everyday fraud cases brought against "respected and legitimate ‘enterprises’."

... The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misapplied.

\textit{Id.} (quoting Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984)).
its remedial purposes." In United States v. Turkette, the Court cautioned that courts "are without authority to restrict the application of [RICO]" beyond its statutory language, and ruled in favor of a broad interpretation of RICO. Congress realized the plausible over-reaching capabilities of RICO; however, the risk was believed to be well taken "in [the] war against an organized crime threat perceived as a real danger to the internal security of the nation."

To win the war against organized crime, Congress adopted the same type of civil remedies that had been successful in the antitrust field. Sections 1964(a) and (b), which give the government authority to bring a civil action against potential RICO defendants, resemble section 4 of the Sherman Act and section 15 of the Clayton Act. In section 1964(c) of RICO, Congress created a private cause of action for treble damages that is almost identical to section 4 of the Clayton Act. Courts have concluded that by adopting the same or similar language as the Clayton Act, Congress intended to adopt the judicial interpretations of the Clayton Act. For this reason, courts regularly refer to antitrust case law for assistance in interpreting the language of civil RICO.

25. Id. at 587.
32. Section 4 of the Clayton Act states:
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.
33. See infra notes 214-20 and accompanying text.
B. Section 1964(c) and Standing

The private cause of action for a civil RICO claim is found in Section 1964(c). The treble damages provision contained in this section is one of the most significant weapons in the fight against organized crime because it is aimed at destroying the organization’s economic base. Aside from the treble damages provision, however, there are three other vital advantages to a section 1964(c) claim: (1) the express cause of action removes section 1964(c) from the grips of judicial interpretation or control, (2) RICO may provide for more relaxed standing rules than those of the underlying predicate acts, and (3) Congress’ mandate for liberal construction requires courts to apply a broad and expansive interpretation of RICO provisions.

In order to bring a section 1964(c) RICO claim, a plaintiff must satisfy the standing requirements enumerated in the statute. Civil RICO, on its face, seems to create “an unrestricted grant of standing to all persons who can allege an injury to business or property resulting from a RICO violation.” However, according to the Supreme Court in *Baker v. Carr*, the doctrine of standing requires that the plaintiff have a sufficient “personal stake in the outcome of the controversy as to assure that the concrete adverseness” will help define the issues in the case. Standing in the federal courts requires that the plaintiff

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38. MacIntosh, supra note 20, at 12. A cause of action expressed by the legislature cannot be limited by the courts. See infra note 113. Implied causes of action, however, are subject to the “recent trend of the Supreme Court” to restrict availability of the right. MacIntosh, supra note 20, at 12 & n.34.
39. See infra text accompanying notes 83-138 (discussing the conflicts among the circuit courts regarding whether or not a civil RICO plaintiff must satisfy the requirements of the underlying predicate act).
40. Bridges, supra note 36, at 45.
41. See supra text accompanying note 23.
42. MacIntosh, supra note 20, at 13.
43. *Joseph*, supra note 34, at 23-24. See supra note 17 (quoting text of § 1964(c) of RICO).
44. Strafer, supra note 26, at 688.
45. 369 U.S. 186 (1962).
46. *Id.* at 204.
claim that "the challenged action has caused him injury in fact,"57 and show a "fairly traceable" causal connection between the claimed injury and the challenged conduct."58 Under the umbrella of this general federal standard, a court must determine if the civil RICO plaintiff has satisfied the explicit requirements of the statute: (1) a violation of section 1962, (2) an injury to business or property, and (3) a causal connection between the violation and the injury.49

1. Violation of Section 1962

Section 1962,50 in conjunction with the definitions set forth in section 1961,51 lists the conduct which is prohibited under RICO.52 A civil RICO plaintiff must be able to prove by a preponderance of the evidence53 that the defendant violated one of the provisions in section 1962.54 It contains three substantive provisions55 and a con-

50. Id.
51. Id. § 1961.
52. The conduct prohibited in § 1962 applies to both the civil and criminal provisions of RICO. Id. §§ 1963(a), 1964(a), (c).
54. 18 U.S.C. § 1964(c).
55. Id. § 1962(a), (b) & (c). The substantive provisions in § 1962 provide in part:
(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income . . . in acquisition of any interest in . . . any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . .
(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which
sporacy provision. To successfully prove a violation of one of the substantive provisions of section 1962, a plaintiff must prove six elements: (1) that a person, through a pattern of racketeering activity or collection of unlawful debt, directly or indirectly, invests in or maintains an interest in, or participates in, an enterprise, the activities of which affect interstate or foreign commerce. The conspiracy provision is satisfied by showing that the defendant conspired to violate one of the substantive provisions of section 1962.

The elements of a "pattern of racketeering activity" are commonly known as the predicate act requirement; that is, the plaintiff must allege at least two predicate acts to form a RICO claim. For example, if a civil RICO plaintiff's claim is for fraud in the sale of

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affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by . . . any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

Id.

56. Id. § 1962(d). Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Id.

57. Section 1961(3) of RICO defines a person as including "any individual or entity capable of holding a legal or beneficial interest in property." Id. § 1961(3).

58. Section 1961(5) of RICO "requires at least two acts of racketeering activity" to constitute a pattern. Id. § 1961(5). See Joseph, supra note 34, at 82-94 (conducting an extensive examination of the "pattern" requirement).

59. See supra note 9 (quoting text of § 1961(1) which defines "racketeering activity").

60. See § 1961(6) of RICO, 18 U.S.C. § 1961(6), for the definition of "unlawful debt."


63. 18 U.S.C. § 1962(a)-(c). See Long, supra note 61, at 240 (discussing the requirements to satisfy the commerce element).


securities under section 1961(1)(D), then he must allege two acts that constitute securities fraud offenses.

2. Injury to Business or Property

RICO does not define the type or magnitude of injury which must be sustained in order to successfully bring a private cause of action under section 1964(c). In the past, courts attempted to create limitations on the type of injury required, but were unsuccessful. In *North Barrington Development, Inc. v. Fanslow*, the court held that a plaintiff needed to claim that he was "injured competitively." The court based its rationale on legislative history which reflected Congress' intention to utilize the antitrust treble damages remedy. However, in *Schacht v. Brown*, the Seventh Circuit rejected the "competitive injury" requirement and held that "the erection of a 'competitive' or 'indirect' injury barrier to RICO recovery comports with neither the plain language nor the central goal of the statute." The *Schacht* court decided that, although Congress relied on the antitrust treble damages provision in creating section 1964(c), RICO's objective of eradicating organized crime is significantly different than the antitrust laws' concern with market efficiency.

The Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.* developed a definition for the term "injury" which better comports with the plain language of section 1964(c). In doing so, the Court rejected a separate "racketeering injury" requirement that the Second Circuit had attempted to impose. The Court held that a plaintiff may have a section 1964(c) claim "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by [sections 1962(a)-(c)] and the racketeering activities injure the plaintiff in his business or

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67. Zepkin, 812 F.2d at 151.
68. 547 F. Supp. 207 (N.D. Ill. 1980).
69. Id. at 211. The *Fanslow* court implied that "competitive injury" is defined as "any kind of injury resulting from the competitive advantage gained by the RICO violator through resort to illegal business tactics." Note, *supra* note 36, at 1110 n.49.
70. *Fanslow*, 547 F. Supp. at 210-11.
71. 111 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).
72. *Id.* at 1358.
73. *Id.*
75. *Id.* at 495. The Court described a "racketeering injury" as "an injury caused by conduct that RICO was designed to deter . . . ." *Id.* at 494.
property." This definition, in essence, insulates the RICO injury element from future restrictions by the lower courts.

3. Causal Connection Between the Violation and the Injury

The requirement of causal connection arises from the language of section 1964(c), which states that a civil cause of action can be maintained if there is an injury to business or property "by reason of" a violation of section 1962. However, civil RICO leaves open the question of the degree of nexus that must exist between the violation and the injury in order to be injured "by reason of" a RICO violation. Courts have interpreted the "by reason of" language as a proximate causation requirement. However, despite the general consensus regarding the existence of a proximate causation requirement, courts have disagreed as to the requisite causal link between the injury and violation.

C. The Conflicting Interpretations

A court, when confronted with the question of whether a plaintiff has standing under section 1964(c), is faced with two difficult issues. First, because proximate causation is not defined, the court must determine an appropriate standard. Second, the court must decide whether Congress intended a civil RICO plaintiff to satisfy the standing requirements of the predicate act in addition to RICO's requirements.

76. Id. at 495.
77. 18 U.S.C. § 1964(c).
78. See supra note 17 (quoting text of § 1964(c) of RICO).
80. See Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1214 (5th Cir. 1988); Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985) (stating that the "by reason of" language creates a proximate cause requirement).
82. See Ginger, supra note 79, at 860-61, 861 n.64 (discussing the different factors courts examine in order to evaluate causation). See also City of Milwaukee v. Universal Mortgage Corp., 692 F. Supp. 992 (E.D. Wis. 1988) (discussing the determination of the link between the RICO violation and the harm alleged).
The latter question has generated heated debate and has divided the circuit courts.

The greatest division among the circuits is found when the predicate act is fraud in the sale of securities under Rule 10b-5. The controversy centers on whether the standing requirement applied in securities law that a Rule 10b-5 plaintiff must be a purchaser or a seller of the securities at issue applies to civil RICO claims. The Ninth and Eleventh Circuits have found that a civil RICO plaintiff needs only to satisfy the standing requirements of section 1964(c). The Fourth and Eighth Circuits, however, have held that a RICO plaintiff must also satisfy the purchaser-seller standing limitation of Rule 10b-5. Before examining these conflicting circuit court opinions, this comment discusses the purchaser-seller limitation and the rationale behind its creation.

The Supreme Court, in Blue Chip Stamps v. Manor Drug Stores, added the purchaser-seller limitation to Rule 10b-5. The Blue Chip Stamps plaintiffs, offerees of common stock in a reorganization plan, claimed standing under section 10(b) of the 1934 Act because the defendant-offeror allegedly made misleading statements which caused the plaintiffs to decline the offer to purchase stocks. The Court denied the plaintiffs' standing to sue. It held that the implied right of action under Rule 10b-5 for fraud in connection with the purchase or sale

83. 17 C.F.R. § 240.10b-5 (1992). Rule 10b-5 provides:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
   (a) To employ any device, scheme, or artifice to defraud,
   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
   (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id. (emphasis added).

84. Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990); Warner v. Alexander Grant & Co., 828 F.2d 1528 (11th Cir. 1987).
86. 421 U.S. 723 (1975).
87. Id. at 726-27.
88. Section 10(b) of the 1934 Act and Rule 10b-5 do not create an express cause of action; however, the Supreme Court has held that there is an implied right of action. Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971).
of a security is available only to purchasers or sellers of the securities at issue. The Court reasoned that, because the private right of action was judicially created, discretion could be applied to add limitations to Rule 10b-5.

The Court added the purchaser-seller limitation to Rule 10b-5 actions due to statutory interpretation and policy considerations. The Court believed that the statutory language, "in connection with the purchase or sale," signaled Congress' intent to limit Rule 10b-5 standing to purchasers or sellers. Three policy considerations favored the purchaser-seller limitation. The first was the fact that the Birnbaum Rule, which established that section 10(b) of the 1934 Act was limited to protecting "the defrauded purchaser or seller," had a "longstanding acceptance by the courts" and Congress.

Second, the Court believed that the purchaser-seller limitation was advantageous in light of the dangers of vexatious litigation. It recognized that there exists a particular danger in securities cases because of their high settlement value. The Court also evidenced a concern for the disruption of business activity due to vexatious litigation.

Thirdly, by limiting Rule 10b-5 actions to purchasers and sellers, problems of proof would be eliminated. The Court noted that, without the purchaser-seller limitation,

bystanders to the securities marketing process could await developments on the sidelines without risk, claiming that

89. Blue Chip Stamps, 421 U.S. at 754-55.
90. Id. at 748-49.
91. Id. at 733-34.
93. Id. at 464.
94. Blue Chip Stamps, 421 U.S. at 733.
95. Id.
96. Id. at 739. Vexatious litigation occurs "when the party bringing [the] proceeding is not acting bona fide, and merely wishes to annoy or embarrass his opponent . . . ." Black's Law Dictionary 1565 (6th ed. 1990).
97. Blue Chip Stamps, 421 U.S. at 740. The Blue Chip Stamps Court stated: [I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.
98. Id.
99. Id. at 743-48.
inaccuracies in disclosure caused nonselling in a falling market and that unduly pessimistic predictions by the issuer followed by a rising market caused them to allow retrospectively golden opportunities to pass.  

Without the demonstrable fact that a plaintiff purchased or sold the security in controversy, a plaintiff could bring his case to a jury based solely upon uncorroborated oral testimony.  

The Blue Chip Stamps rationale requires that courts with a civil RICO plaintiff whose claim is based on a violation of Rule 10b-5 decide if the rationale extends to the RICO claim. Some circuits have held that the Blue Chip Stamps rationale does not extend to civil RICO and have not applied the purchaser-seller limitation. Other circuits have held that Congress intended Blue Chip Stamps to extend to civil RICO and have limited Rule 10b-5 claims to purchasers and sellers. This comment examines these conflicting circuit court decisions.

1. Purchaser-Seller Limitation Does Not Apply to Civil RICO

In Warner v. Alexander Grant & Co., the Eleventh Circuit held that RICO did not have a purchaser-seller limitation equal to that of the federal securities laws. The court stated that a RICO plaintiff "need only allege injuries personally sustained as a result of conduct violative of the federal RICO statute." It did not explain its rationale for concluding that a purchaser-seller limitation did not apply to RICO. However, the language of the opinion suggests that the court based its decision on a literal reading and broad application of the statute.

100. Id. at 747.
101. Id. at 746.
102. See supra note 84 and accompanying text.
103. See supra note 85 and accompanying text.
104. 828 F.2d 1528 (11th Cir. 1987). The plaintiff in Warner v. Alexander Grant & Co. was a customer of the bankrupt ESM Government Securities company and a principal of Home State Savings Bank of Ohio and American Savings & Loan Association of Miami, Florida, which were customers of ESM. The defendants, Alexander Grant & Company and the individual general partners of the company, were ESM's auditor. The complaint alleged that the defendants issued fraudulent and misleading reports regarding the financial status of ESM and were involved in a conspiracy to defraud the plaintiff. The plaintiff sought relief under § 10(b) of the Securities Exchange Act of 1934 (the 1934 Act) and under federal RICO. Id. at 1529.
105. Id. at 1530.
106. Id.
107. Warner stated that "[t]he federal RICO statute has no requirement analogous to the 'purchase or sale' requirement of the federal securities laws." Id.
The Ninth Circuit, in *Securities Investor Protection Corp. v. Vigman*, 108 followed *Warner's* holding that the text of RICO does not have a purchaser or seller requirement. 109 The Ninth Circuit emphasized that the source of the private right of action under section 1964(c) is an express right legislated by Congress.110 Unlike the express right of action of civil RICO, the Rule 10b-5 private cause of action is judicially created.111 Therefore, although Rule 10b-5 can sustain judicial limitations,112 courts are restricted from adding any limitations to a section 1964(c) cause of action.113 According to the court, *Sedima, S.P.R.L. v. Imrex Co.* 114 clearly upheld a broad reading of RICO in light of Congress' use of expansive language and inclusion of a liberal construction mandate.115 The court granted standing to the RICO plaintiffs holding that the Rule 10b-5 purchaser-seller limitation does not apply to RICO claims based on fraud in the sale of securities.116

2. Purchaser-Seller Limitation Does Apply to Civil RICO

In *International Data Bank, Ltd. v. Zepkin*, 117 the Fourth Circuit extended the *Blue Chip Stamps* rationale118 to a section 1964(c) RICO protocol. 108. 908 F.2d 1461 (9th Cir. 1990). The plaintiffs in *Securities Investor Protection Corp. v. Vigman* were the Securities Investor Protection Corporation and trustees in bankruptcy of two defunct stock brokerage firms. Seventy-five original defendants were alleged to have conspired to manipulate the prices of stocks of publicly traded corporations. The plaintiffs sued under civil RICO based on § 10(b) of the 1934 Act. 

109. Id. at 1466.

110. Id.

111. Id. See supra note 88 (discussing Rule 10b-5's implied cause of action).

112. Vigman, 908 F.2d at 1466.

113. Id.

[If Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.

Id. (quoting *Blue Chip Stamps*, 421 U.S. at 748-49).


115. Vigman, 908 F.2d at 1466.

116. Id. at 1467.

117. 812 F.2d 149 (4th Cir. 1987). The plaintiff in *International Data Bank, Ltd. v. Zepkin* was International Data Bank (IDB) and the defendants were the original creators of IDB. IDB, under the control of the outside investors who ousted the defendants, alleged that the stock prospectus issued by the defendants for IDB included fraudulent statements. IDB sued under RICO based on the predicate act of fraud in the sale of securities. 

Id. at 150.

118. See supra notes 86-103 and accompanying text.
claim and denied standing to the plaintiff, who was neither a purchaser nor a seller. First, the court found that statutory interpretation revealed that "fraud in the sale of securities" is "narrow and suggests the pivotal role of the actual sales transaction."119 It then compared the language of other definitions in section 1961(1) to section 1964(c)123 and found that Congress intentionally limited the language of "fraud in the sale of securities."121 Therefore, the court concluded that Congress' choice of narrow language limited standing to the actual purchaser or seller when a RICO plaintiff's claim is based on a Rule 10b-5 predicate offense.122

Additionally, Zepkin upheld the policy considerations of Blue Chip Stamps.123 The Zepkin court rebutted the argument that the courts cannot add limitations to section 1964(c) because it is an express right of action. "[M]any elements of the RICO action," the court stated, "have not been clearly legislated."124 Therefore, the court held that it would be proper to consider the policy considerations enumerated in the Blue Chip Stamps rationale.125

The circuit court found that the Birnbaum Rule applied to RICO. It stated that Congress was aware of both the history of federal securities law and the Birnbaum Rule, which had been applied for almost twenty years.126 The court believed that if Congress had intended to overturn forty years of development in federal securities laws, it would have used clearer and more explicit language.127 According to the court, Congress expanded the types of remedies available to a plaintiff by enacting RICO, and did not intend to overturn well settled law.123

The Fourth Circuit then considered the dangers of vexatious litigation.129 The court noted that, not only are the same dangers still present, but the treble damages provision of section 1964(c) increases the danger of vexatious litigation.130 Additionally, the court argued

119. Zepkin, 812 F.2d at 152.
120. Id. The court stated that "[i]n contrast [to section 1964(c)], Congress did use the broader language 'any offense involving fraud connected with a case under title 11 [bankruptcy]' in the same part of the RICO statute." Id.
121. Id.
122. Id.
123. See supra notes 91-101 and accompanying text.
125. Id.
126. Id. at 152.
127. Id.
129. Id. See supra notes 96-98 and accompanying text.
130. Zepkin, 812 F.2d at 153.
that under RICO, the problems of proof with respect to causation would be magnified. Therefore, after applying the Blue Chip Stamps rationale, the court denied standing to the plaintiff because he was neither a purchaser nor a seller.

The Eighth Circuit in Brannan v. Eisenstein also held that a civil RICO plaintiff must meet the standing requirements of Rule 10b-5. The Brannan court did not explain its rationale, but merely dismissed the RICO claim because the plaintiffs lacked standing under Rule 10b-5.

III. Analysis

In Holmes v. Securities Investor Protection Corp., the Supreme Court considered a civil RICO claim based on section 10(b) of the 1934 Act in which the plaintiff was neither a purchaser nor a seller of the securities involved. The Court was forced to determine whether or not the plaintiff could maintain standing under civil RICO. Despite the current division among the circuit courts regarding the purchaser-seller limitation under Rule 10b-5, the Court focused on the causation element of civil RICO standing. After an analysis of section 1964(c) in light of its antitrust pedigree, the Court reaffirmed the proximate causation requirement and established a direct relationship standard. Although the Court refrained from resolving the purchaser-seller limitation conflict, the concurring opinions strongly stated that the purchaser-seller limitation does not apply to civil RICO claims.

A. The Facts

In response to the failure of several brokerage houses, Congress enacted the Securities Investor Protection Act (SIPA) in 1970.
SIPA authorized the creation of the Securities Investor Protection Corporation (SIPC), a non-profit organization, to protect "customers of brokers and dealers and members of national securities exchanges." Registered brokers and dealers comprise SIPC's membership. The SIPC has various powers, including the power to obtain a protective decree whenever it ascertains that a broker-dealer member "has failed or is in danger of failing to meet its obligations to customers . . . ." Once a protective decree is granted, a federal court must then appoint a trustee for the liquidation of the broker-dealer member. SIPC is responsible for advancing up to $500,000 per customer when the trustee determines there are no more available assets.

In July of 1981, the SIPC began liquidation proceedings against two failing securities brokerage houses, First State Securities Corporation (FSSC) and Joseph Sebag, Inc. (Sebag). Protective decrees were issued and trustees were appointed for both of the failing brokerages. The SIPC advanced $13 million to FSSC and Sebag customers because the brokerages' assets were inadequate to cover all of the claims.

Two years after the liquidation of FSSC and Sebag, the SIPC and the appointed trustees brought suit in federal district court against seventy-five defendants, some of whom were officers and directors of six different companies. The others were former principals and

141. Id.
142. Id. (citing 15 U.S.C. § 78ccc(a)).
143. The "[SIPC] has the power 'to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any State, Federal or other court.'" Id. (citing 15 U.S.C. § 78ccc(b)(1)).
144. Holmes, 112 S. Ct. at 1314 (quoting 15 U.S.C. § 78eee(a)(3)).
145. Id. (citing 15 U.S.C. § 78eee(b)(3)).
146. Id. The process of reimbursing the broker-dealer's customers is first to return all securities registered in the name of specific customers. Id. (citing 15 U.S.C. §§ 78fff-2(c)(2), 78fff(a)(1)(A) & 78必然(3)). The remaining securities are pooled together, and the pool is divided among the customers. Id. (citing 15 U.S.C. §§ 78fff-2(b), 78fff(a)-l(B)). If there are any unsatisfied claims, then the SIPC is responsible for satisfying those claims up to $500,000. Id. (citing 15 U.S.C. § 78fff-3(a)).
147. Vigman, 908 F.2d at 1464.
148. Holmes, 112 S. Ct. at 1314.
149. Vigman, 908 F.2d at 1464. See supra note 146 (describing the cash advancement process).
150. The six companies were Aero Systems, Inc.; Aerosonics Corporation; Bunnington Corporation; Creditbank, Inc.; Dash Industries, Inc.; and Osrow Products Corporation. Vigman, 908 F.2d at 1464 n.3.
employees of FSSC and Sebag. The plaintiffs alleged that the defendants engaged in a plan to manipulate the stock of the six companies with whom they were affiliated and that the defendants utilized FSSC and Sebag to further the plan. Discovery of the scheme caused the market prices of the stock to drop dramatically. FSSC and Sebag incurred detrimental losses as a result because they held the stock in their proprietary accounts. FSSC’s and Sebag’s financial troubles led to their liquidation and, consequently, to the SIPC’s advance of $13 million to cover the claims of FSSC’s and Sebag’s customers. The complaint stated that the defendants had violated section 10(b) of the 1934 Act, Rule 10b-5 promulgated thereunder, and the mail and wire fraud statutes. The plaintiffs maintained that they were entitled to recover treble damages under section 1964(c) of civil RICO because the defendants’ acts constituted a “pattern of racketeering activity” under section 1962 of RICO.

Robert G. Holmes, Jr., one of the seventy-five defendants, was the founder, chief executive officer, president, and major stockholder of Aero Systems, Inc., one of the six companies involved in the controversy. The plaintiffs alleged that Holmes made false statements about Aero’s financial future and that he sold small amounts of stock of the Bunnington Corporation, another of the six companies at issue, in order to simulate an active market for the stock. On

151. Id. at 1464.
152. The manipulation of the six companies was alleged to have been carried out by misrepresentations by company officials, press releases and financial statements. Id. The defendants were also alleged to have deluded the public into believing that there was an active market in the six companies’ stocks, when in fact the defendants were conducting misleading transactions in their own accounts, in the brokerages’ accounts and in customers’ accounts who had no knowledge of the fact. Id.
153. Id.
154. Vigman, 908 F.2d at 1464.
155. Id. The proprietary accounts of Sebag and FSSC held stock of the six companies as part of the scheme to create the illusion of an active market in the stocks. Id.
156. Holmes, 112 S. Ct. at 1315.
157. Id.
161. Holmes, 112 S. Ct. at 1315.
162. Vigman, 908 F.2d at 1464.
163. Id. Holmes allegedly issued false and misleading public statements about a new product Aero was marketing in order to artificially inflate the value of Aero’s stock. Id.
164. Id.
October 24, 1988, Holmes moved for summary judgment in the District Court for the Central District of California on the following grounds:

that SIPC had no standing to maintain claims against him under Section 10(b) and Rule 10b-5 of the Exchange Act because SIPC was not a purchaser or seller of securities . . . that he was not liable to either SIPC or to the trustees because his acts, taken alone or in conjunction with those of others, were not the proximate cause of the financial failure of the brokerages . . . that SIPC and the trustees had no standing under RICO to sue him for the failure of the brokerages because SIPC’s and the trustees’ damages were not caused “by reason of” the alleged RICO violations [and that] SIPC did not have standing to assert RICO claims against Holmes which were predicated upon Holmes’ alleged predicate offenses under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder because SIPC, not having been a purchaser or seller of the securities, had no standing to assert the alleged predicate claims.165

B. The District Court Decision

With regards to almost all of the defendants, the district court found genuine issues of material fact in dispute concerning the elements of the plaintiffs’ RICO claims.166 However, the court entered summary judgment for Holmes with regards to these claims,167 because the SIPC did not “meet the ‘purchaser-seller’ requirements for standing to assert


166. The material facts in genuine dispute included: (1) whether Holmes “invested any income derived from a pattern of racketeering activity in an enterprise engaged in interstate commerce”; (2) whether Holmes “acquired, through a pattern of racketeering activity, an interest in or control of an enterprise”; (3) whether Holmes “was employed or associated with an enterprise and conducted the affairs of the enterprise through a pattern of racketeering activity”; (4) whether Holmes “conspired to violate RICO Sections 1962(a); 1962(b); or 1962(c)”; (5) whether “the alleged ‘predicate acts’ are offenses involving fraud in the sale of securities”; and (6) whether “at least two ‘predicate acts’ occurring within ten years of each other which meet the criteria of relatedness and continuity to constitute a ‘pattern’ of racketeering activity.” Holmes v. Securities Investor Protection Corp., appeal to petition for cert. at 44a-45a (U.S. Mar. 24, 1992) (No. 90-727).

167. Id. at 45(a).
RICO claims which are predicated upon violation of Section 10(b) and Rule 10b-5 of the 1934 federal Securities Exchange Act.\textsuperscript{168}

The court found that there was a genuine issue of material fact as to whether Holmes’ acts actually caused the plaintiff’s injuries.\textsuperscript{169} Nevertheless, it held “that there was no genuine issue for trial to dispute the fact that Holmes’ acts were not the proximate cause of the losses.”\textsuperscript{170} The court arrived at its conclusion by separating Holmes’ acts from those of the other conspirators and by requiring a “loss causation” finding.\textsuperscript{171}

The district court entered a partial judgment for Holmes, although the SIPC still had claims pending against other defendants.\textsuperscript{172} The plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit.\textsuperscript{173}

C. The Circuit Court Decision

The Ninth Circuit, in a unanimous decision, reversed the summary judgment motion of the district court.\textsuperscript{174} The court held that a RICO plaintiff, whose claim is based on securities fraud under section 10(b) of the 1934 Act, did not have to meet the purchaser or seller standing requirement applicable to Rule 10b-5 causes of action.\textsuperscript{175} It based its decision on a broad reading of section 1964(c)’s standing requirements, and on a refusal to limit the express cause of action granted by Congress. In light of the district court’s findings of genuine issues regarding Holmes’ participation in the manipulation scheme and whether the conspiracy caused the harm, the Ninth Circuit held that it was an error to grant summary judgment to Holmes.\textsuperscript{176}

The circuit court began its analysis by determining whether the purchaser-seller limitation for standing under a Rule 10b-5 claim is

\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Vigman, 908 F.2d at 1465.
\textsuperscript{171} Id. The Ninth Circuit has stated that when bringing a claim under Rule 10b-5 “for material omissions or misstatements, the plaintiff must prove both transaction causation, that the violations in question caused the plaintiff to engage in the transaction, and loss causation, that the misrepresentations or omissions caused the harm.” Id. at 1467 (quoting Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 773 (9th Cir. 1984)).
\textsuperscript{172} Holmes, 112 S. Ct. at 1315.
\textsuperscript{173} Id.
\textsuperscript{174} Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990). The opinion of the circuit court was delivered by Circuit Judge Thompson.
\textsuperscript{175} Id. at 1467.
\textsuperscript{176} Vigman, 908 F.2d at 1470.
applicable to a RICO claim based on fraud in the sale of securities.\textsuperscript{177} First, the court looked at the text of RICO and contrasted it with the text of Rule 10b-5.\textsuperscript{178} The court found that, unlike the language in Rule 10b-5 which states that the unlawful act must be “in connection with the purchase or sale of any security,”\textsuperscript{179} there is no language in RICO which contains a purchaser-seller limitation.\textsuperscript{180} As long as a RICO plaintiff has suffered an injury “by reason of” the alleged securities fraud, he or she need not be a purchaser or seller of the securities.\textsuperscript{181}

The court then looked at the sources of the civil remedies for both RICO and Rule 10b-5. It determined that, because the courts created the private cause of action under Rule 10b-5, the courts have the power to limit the class of plaintiffs who can claim that particular right of action.\textsuperscript{182} On the other hand, Congress, not the courts, created RICO’s private cause of action. Therefore, the court stated that it would “not be appropriate for [the] court to impose a [purchaser-seller] limitation” when the statute does not contain such a limitation.\textsuperscript{183} The court cited \textit{Sedima, S.P.R.L. v. Imrex Co.}\textsuperscript{184} in support of its expansive reading of RICO’s language.\textsuperscript{185}

The Ninth Circuit next focused on whether the plaintiffs satisfied the causation element of a RICO claim. The district court had stated that, in order to succeed with a RICO claim, the plaintiffs had to show proximate cause and “loss causation.”\textsuperscript{186} The circuit court agreed with the lower court in that a “loss causation” requirement attaches to a RICO claim which is based on a Rule 10b-5 violation.\textsuperscript{187} The

\textsuperscript{177} Id. at 1466.

\textsuperscript{178} Id.

\textsuperscript{179} Id. (quoting Rule 10b-5, 17 C.F.R. § 240.10b-5).

\textsuperscript{180} \textit{Vigman}, 908 F.2d at 1466.

\textsuperscript{181} Id.

\textsuperscript{182} Id. (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975)).

\textsuperscript{183} Id.

\textsuperscript{184} 473 U.S. 479 (1985).

\textsuperscript{185} \textit{Vigman}, 908 F.2d at 1466. The court quoted \textit{Sedima}, which stated that “RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to ‘be liberally construed to effectuate its remedial purposes.’” \textit{Sedima, S.P.R.L.}, 473 U.S. at 497-98.

\textsuperscript{186} \textit{Vigman}, 908 F.2d at 1467. \textit{See supra} note 171 (stating the Ninth Circuit’s definition of “loss causation”).

\textsuperscript{187} \textit{Vigman}, 908 F.2d at 1467 (citing Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 773 (9th Cir. 1984); Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380 (2d Cir. 1974)).
circuit court held, however, that the "loss causation" element is not "some additional requirement which must be shown over and above 'proximate cause.'" The circuit court described "loss causation" as the standard rule of tort law, for which the plaintiff must allege and prove that a sufficient causal connection exists between the defendant's actions and the plaintiff's injury. It concluded that the SIPC and the trustees need only show that the predicate act of securities fraud by Holmes was the proximate cause of the injuries.

The circuit court then turned to the question of whether the plaintiffs satisfied the proximate cause standard. The district court had found that Holmes' actions alone did not proximately cause the injuries to the SIPC and the trustees. The circuit court stated, however, that Holmes' actions should not have been analyzed separately from the acts of the other conspirators. A conspiracy must be viewed as a whole, and all the members of a conspiracy are liable for the actions of the other conspirators. In light of the district court's finding that there was a genuine issue of material fact regarding Holmes' participation in the alleged conspiracy to manipulate the stock prices of six companies, the circuit court concluded that Holmes' motion for summary judgment should have been denied.

Holmes petitioned the United States Supreme Court for a writ of certiorari on two issues. The first was whether the SIPC had standing to sue under RICO, even though the SIPC could not satisfy the purchaser-seller limitation of section 10(b) of the Securities Ex-

188. Id.
189. Id. (citing Bastian v. Petren Resources Corp., 892 F.2d 680, 686 (7th Cir. 1990)).
190. Id. at 1468 (citing Bastian, 892 F.2d at 683).
191. Vigman, 908 F.2d at 1468.
192. Id.
193. Id. (quoting United States v. Patten, 226 U.S. 525, 544 (1913)).
194. Id. (quoting Beltz Travel Serv. v. International Air Transp. Ass'n, 620 F.2d 1360, 1367 (9th Cir. 1980)).
195. Holmes argued that the district court incorrectly found that a genuine issue existed. Vigman, 908 F.2d at 1469. However, the circuit court held that the district court made an evidentiary decision which can only be overturned if there is a finding of abuse of discretion. Id. The circuit court did not find any abuse of discretion by the lower court. Id.
196. See supra note 166.
197. Vigman, 908 F.2d at 1470.
change Act of 1934. The second was whether Holmes was liable for the acts of his co-conspirators even if his acts alone were not causally connected to the SIPC's injury. The Court granted certiorari only on the issue of whether the SIPC had standing to sue under civil RICO.

D. The Supreme Court Decision

In a majority opinion, the United States Supreme Court reversed the Ninth Circuit's decision. The Court held that the SIPC did not satisfy the standing requirements of section 1964(c). The opinion focused on an analysis of the causation requirement under civil RICO in light of the statutory history of the antitrust laws and RICO. Although certiorari was granted only on the issue of whether a civil RICO plaintiff needed to satisfy the purchaser-seller limitation when the predicate act is a violation of section 10(b) of the Securities Exchange Act of 1934, the Court held that the issue of proximate cause was "fairly included" in the main issue. It subsequently found that the SIPC failed to meet the required proximate cause element. The Court felt that the purchaser-seller limitation issue did not need to be resolved because the case could be properly decided on the causation element.

The opinion began with an analysis of the language of section 1964(c) of RICO. A straightforward reading of section 1964(c), the

199. Id. Holmes only challenged the SIPC's right to sue under civil RICO and not the trustees. Therefore, the trustees' case continued. Holmes, 112 S. Ct. at 1316 n.8.

200. Holmes, petition for cert. at i (No. 90-727).

201. Holmes, 112 S. Ct. at 1316. In a footnote, the Court assumed that the court of appeals' decision to hold Holmes responsible for the acts of his conspirators to be correct. Id. at 1316 n.6.

202. Justice Souter wrote the opinion for the Court. Justice O'Connor, with whom Justice White and Justice Stevens joined, concurred in part and concurred in judgment. Justice Scalia filed a separate opinion and concurred in judgment.


204. Id. at 1322.


206. Holmes, 112 S. Ct. at 1317 n.12 (citing Sup. Ct. R. 14.1(a) (1991)). Rule 14.1(a) of the Supreme Court of the United States provides that "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a).

207. Holmes, 112 S. Ct. at 1322.
Court stated, would seem to suggest that a RICO plaintiff can recover treble damages by showing that the defendant violated section 1962,\(^{208}\) that the plaintiff sustained an injury, and that "but for" the defendant's actions, the plaintiff was injured.\(^{209}\) The Court held, however, that Congress did not intend "all factually injured plaintiffs to recover."\(^{210}\) The Court inferred a congressional intent to limit the amount of potential plaintiffs from *Blue Shield of Virginia v. McCready*,\(^{211}\) in which the Court stated that "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of [section] 4 [of the Clayton Act,] there is a point beyond which the wrongdoer should not be held liable."\(^{212}\) The Court found that an expansive interpretation of RICO was inappropriate and rejected "but for" causation.\(^{213}\)

To determine the correct type of causation requirement for section 1964(c), the Court considered the statutory history of RICO. The Court noted that Congress modeled section 1964(c) after section 4 of the Clayton Act,\(^{214}\) which included language borrowed from section 7 of the Sherman Act.\(^{215}\) Prior judicial interpretation of section 7 of the Sherman Act included the incorporation of a proximate causation requirement.\(^{216}\) Courts assumed that, by using the language of the Sherman Act in the Clayton Act, Congress intended to adopt "the judicial gloss that avoided a simple literal interpretation" of the Sherman Act.\(^{217}\) Therefore, under section 4 of the Clayton Act, a plaintiff

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208. See *supra* notes 55-56 (providing text of § 1962 of RICO).
210. Id.
213. Id. at 1316-17. The Court further noted that an overwhelming number of courts of appeals have rejected the "but for" causation and have adopted a proximate causation requirement. Id. at 1317 n.11. The Court cited several cases which recognize a proximate causation requirement, including *Vigman*. Id.
must show that the defendant's violation was the proximate cause of his or her injury. By applying the same logic to RICO, the Court found that Congress intended to incorporate the judicial interpretations of the Clayton Act into the RICO statute. The Court, therefore, concluded that a RICO plaintiff must show proximate cause.

The Court went further in the causation analysis to determine what degree of causal connection would be sufficient for proximate causation. Although proximate causation has been defined in various terms, the Court emphasized the direct relationship view. The Court held that proximate cause "demand[s] . . . some direct relation between the injury asserted and the injurious conduct alleged." The Court stated three reasons, developed in the antitrust case of Associated General Contractors of California v. California State Council of Carpenters, which reveal the disadvantages of granting standing to indirectly injured plaintiffs: (1) difficulty in ascertaining the damages of indirect injuries sustained by the violation alone; (2) adoption of complicated rules to apportion damages for various levels of indirect injuries; and (3) violative conduct is not deterred by including indirect victims, because direct victims will bring claims. The Court stated that these reasons "apply with equal force to suits under section 1964(c)."

Before conducting a proximate cause analysis or applying the Associated General Contractors' rationale to the facts of the case, however, the Court took issue with the SIPC's arguments to recover damages. The SIPC claimed that, according to "common law rights of subrogation," the SIPC is subrogated to the rights of the customers of the broker-dealers who had not purchased securities in the fraudulent scheme. The SIPC argued that it was entitled to recover the "money

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218. Id.
219. Id. at 1317-18.
220. Id. at 1318.
221. Proximate cause is characterized as a "judicial [tool] used to limit a person's responsibility for the consequences of that person's own acts." Holmes, 112 S. Ct. at 1318. The theory of proximate cause reveals the "ideas of what justice demands, or of what is administratively possible and convenient." Id. (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS § 41, at 264 (5th ed. 1994)).
222. Id.
223. Id.
225. Holmes, 112 S. Ct. at 1318.
226. Id.
227. Id.
228. Id. at 1319.
229. Holmes, 112 S. Ct. at 1319.
paid to customers for customer claims against 3rd parties." The Court was unable to address the issue of subrogation rights because the SIPC left many unanswered questions regarding the nature of the "common law rights of subrogation." The SIPC also argued that the SIPA gives the SIPC the right to sue. The Court disagreed and held that the SIPA does not clearly give the SIPC the right to sue Holmes for damages.

Despite the unanswered questions regarding the SIPC's subrogation rights, the Court analyzed the facts of the case to determine if the SIPC had satisfied the proximate causation requirement. It found that "the link [was] too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers." The alleged injury to the nonpurchasing customers by the conspirators resulted from the initial injury to the broker-dealers, which left the broker-dealers insolvent and unable to pay the customers' claims. The Court noted that the cause of the nonpurchasing customers' injury was the same for the broker-dealers' creditors injuries; the broker-dealers were unable to pay their bills due to their insolvency. It held that only "the intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors." The Court then applied the reasoning in Associated General Contractors to show the disadvantages of granting the SIPC standing. First, the Court dealt with the issue of the difficulty in isolating the damages of an indirect injury which resulted solely from the violation. It argued that the broker-dealers' insolvency could be due to factors other than the alleged manipulation scheme. For example, the financial troubles of the brokerage houses could have been the result of poor business practices or the failure to be prepared for developments

230. Id. (quoting Respondent's Brief at 38, Holmes (No. 90-727)) (internal quotations omitted).
231. Id. The SIPC failed to explain whether the common law rights came from federal or state law and, if from a state, which state. Id.
232. Id. at 1321.
233. See supra note 231.
234. Holmes, 112 S. Ct. at 1319.
235. Id.
236. Id.
237. Id.
238. See supra text accompanying notes 225-27 (discussing the Associated Gen. Contractors rationale).
239. Holmes, 112 S. Ct. at 1320.
in the financial markets.\textsuperscript{240} The Court would have to determine the amount of harm the manipulation scheme caused the nonpurchasing customers, apart from other possible factors.\textsuperscript{241}

The Court then, assuming that causation could be assessed,\textsuperscript{242} addressed the problem of apportioning recoveries. In \textit{Associated General Contractors}, the Court stated that complicated rules would have to be adopted to allocate the various levels of recoveries.\textsuperscript{243} \textit{Holmes} involved the same issue. Therefore, the district court would have to develop a method to determine the amount the broker-dealers and the customers would possibly recover.\textsuperscript{244}

Finally, the Court focused on the third rationale in \textit{Associated General Contractors}, which stated that the deterrent effect of the statute is not advanced by providing the indirectly injured party with standing, because the directly injured victims can be relied upon to bring suit.\textsuperscript{245} In fact, the Court stated that the broker-dealers had already brought suit through the trustees appointed by the district court.\textsuperscript{246} The importance of disallowing standing to indirect victims in the SIPC’s particular situation is heightened because of the insolvency of the broker-dealers. The Court believed that the SIPC was trying to circumvent the higher priority which the broker-dealers had in the liquidation proceedings.\textsuperscript{247}

In considering the rationale of \textit{Associated General Contractors}, the Court denied that the congressional mandate for liberal construction of RICO\textsuperscript{248} was not being followed. The Court stated that there was “nothing illiberal in [the] construction” of section 1964(c)\textsuperscript{249} and that it did not “hold . . . that RICO cannot serve to right the conspirators’ wrongs, but merely that the nonpurchasing customers, or SIPC in their stead, [were] not proper plaintiffs.”\textsuperscript{250} The Court emphasized the fear stated in \textit{Associated General Contractors}, that permitting indirectly

\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} See supra text accompanying note 226.
\textsuperscript{244} Holmes, 112 S. Ct. at 1320.
\textsuperscript{245} Id.
\textsuperscript{246} Id. The suit by the trustees satisfies the deterrent motive of the statute. \textit{Id.} at 1320-21.
\textsuperscript{247} Id. at 1321.
\textsuperscript{248} See supra text accompanying note 23.
\textsuperscript{249} Holmes, 112 S. Ct. at 1321.
\textsuperscript{250} Id.
injured victims to bring suit would open the door for "massive and complex damages litigation [which] not only burdens the courts, but also undermines the effectiveness of treble-damages suits." 251

In conclusion, the Court held that the SIPC’s subrogation rights of the manipulation scheme’s indirect victims did not satisfy the proximate cause requirement of section 1964(c). 252 However, the SIPC was not left without any chance of recovery. It may have a share in a recovery by the trustees in their suit against Holmes, 253 depending on the priority placed on its claim by the SIPA. 254

The majority addressed the issue of whether a civil RICO plaintiff whose claim is based on section 10(b) of the 1934 Act must satisfy the purchaser-seller requirement. However, the Court chose not to decide the issue in Holmes. 255 The Court stated that, although the circuit courts seemed divided on the issue of the purchaser-seller limitation, 256 the "conflicting cases . . . could have been resolved on proximate-cause grounds." 257 The Court did not believe that the circuit courts needed to have the issue resolved or that they were being "deprive[d] . . . of much-needed guidance." 258 The Court also noted that the litigants in Blue Chip Stamps v. Manor Drug Stores, "persons who had decided to forgo securities transactions in reliance on misrepresentations," 259 were unlike any of the litigants in the conflicting circuit court cases, 260 including the SIPC. The Court believed it was an "inopportune [time] to resolve the issue . . . ." 261

251. Id. (quoting Associated Gen. Contractors, 459 U.S. at 545) (internal quotations omitted).
252. Id.
253. Holmes, 112 S. Ct. at 1321.
254. Id.
255. Id. at 1321-22.
256. Id. The Court cited to the following circuit court cases which held that the purchaser-seller limitation did not apply to RICO claims: Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990); Warner v. Alexander Grant & Co., 828 F.2d 1528 (11th Cir. 1987). Holmes, 112 S. Ct. at 1322 n.23. The Court also cited to the following circuit court cases which applied the purchaser-seller limitation to RICO claims: International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987); Brannan v. Eisenstein, 804 F.2d 1041 (8th Cir. 1986). Holmes, 112 S. Ct. at 1322 n.23.
257. Holmes, 112 S. Ct. at 1322.
258. Id.
259. Id.
260. See supra notes 104, 108, 117 & 134 (describing the litigants in the conflicting circuit court cases).
261. Holmes, 112 S. Ct. at 1322.
E. The Concurrences

Justice O'Connor filed an opinion in *Holmes* in which she concurred with part of the majority opinion and concurred in the judgment. She agreed with the majority that civil RICO does include a proximate cause requirement and that the SIPC failed to satisfy the requirement. She disagreed, however, with the majority's decision to postpone resolving the question of whether a plaintiff needs to be a purchaser or a seller in order to have standing under a RICO claim based on Rule 10b-5. Justice O'Connor believed that the question upon which the Court granted *certiorari* should have been decided before the majority determined whether the SIPC satisfied the proximate causation element. She also found that the purchaser-seller limitation of Rule 10b-5 does not apply to a civil RICO claim.

Justice O'Connor began her analysis with a brief history of the development of section 10(b) of the 1934 Act. The notable events in section 10(b)'s development included the judicial creation of an implied right of action and the adoption of the *Blue Chip Stamps* purchaser-seller standing limitation. In reviewing the lower court decisions of *Holmes*, the Justice noted that the opinions conflicted due to the purchaser-seller standing limitation of Rule 10b-5. The district court applied the purchaser-seller standing limitation. However, the circuit court held that the *Blue Chip Stamps* limitation did not apply to RICO claims. In light of the dispute in the lower courts, Justice O'Connor stated that she would have affirmed the circuit court's rejection of the purchaser-seller limitation. She based her decision on an in-depth

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262. Justice White and Justice Stevens joined in Justice O'Connor's concurrence. *Id.*
263. *Id.*
264. *Id.*
265. See supra text accompanying note 201 (providing the question upon which the petition for *certiorari* was granted).
266. *Holmes*, 112 S. Ct. at 1322.
267. *Id.*
268. *Id.* (citing Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971)).
269. See supra text accompanying notes 86-101 (providing an analysis of Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)).
270. *Holmes*, 112 S. Ct. at 1323.
271. *Id.*
272. *Id.*
273. *Id.*
analysis of the text of RICO and a determination that the Blue Chip Stamps rationale does not extend to RICO.

In her analysis of the text, Justice O'Connor concluded that, on its face, RICO does not include a purchaser-seller requirement. RICO "sweeps broadly," and the language "any person" cannot be taken as including only purchasers or sellers. In Sedima, the Court held that "[t]here [was] no room in the statutory language for an additional . . . requirement." Justice O'Connor noted that standing is already limited to those who have been injured "in fact" by a RICO violation and although she agreed with the majority's decision to adopt the proximate cause requirement of the antitrust laws, she did not believe the requirement was a "bright line test" that excluded nonpurchasers and nonsellers.

Justice O'Connor then addressed the issue of whether the standing requirements of the predicate acts are superimposed upon section 1964(c). Section 1964(c)'s language focuses on the injury to the plaintiff, not on the standing requirements of the predicate acts. Justice O'Connor recognized that a majority of the predicate acts listed in section 1961(1) are criminal offenses. To require a civil RICO plaintiff to meet the standing requirements of these predicate acts would result in a grant of standing only to the state or federal government to bring most RICO suits. Therefore, Justice O'Connor concluded that Congress' use of the "any person injured by reason of" language in section 1964(c) was not intended to include the standing requirements of predicate acts.

Justice O'Connor rejected the argument that an exception should be made for "fraud in the sale of securities" because of the established purchaser-seller limitation of Rule 10b-5. The Justice based her argument on the fact that the predicate offense for fraud in the sale of securities defined in section 1961(1) requires that "the elements

274. See supra text accompanying notes 86-101 (providing an analysis of Blue Chip Stamps).
276. Id.
277. Id. (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985)).
278. Id. at 1323-24.
279. Holmes, 112 S. Ct. at 1324.
280. Id.
281. Id.
282. Id.
283. Holmes, 112 S. Ct. at 1324.
284. Id.
necessary to bring a criminal prosecution” must be satisfied. She stated that, with regard to the predicate offense of fraud in the sale of securities, it does not matter if Congress intended to include the civil standing requirements in the civil RICO provisions. Congress did not define “fraud in the sale of securities”; however, Justice O'Connor stated that RICO “unmistakably requires that there be fraud, sufficiently willful to constitute a criminal violation, and that there be a sale of securities.” The Justice believed that, although Congress used the term “sale,” the intention was not to limit RICO plaintiffs to parties to the transaction.

Justice O'Connor then focused on the Blue Chip Stamps rationale to limit standing in Rule 10b-5 actions to purchasers or sellers. There were several reasons why, according to the Justice, the rationale of Blue Chip Stamps should not be applied to section 1964(c). The judicial creation of section 10(b)'s right of action was the most significant reason. The Court limited the section 10(b) implied right of action out of concern for vexatious litigation and problems of proof. Although the same issues exist with RICO claims, the Justice noted that Congress has the power to create a private cause of action regardless of the ensuing problems. Therefore, “the courts are without authority to restrict the application of the statute.”

In conclusion, Justice O'Connor agreed with the majority that the conflicting circuit court cases could have been resolved more appropriately with a proximate causation analysis. However, the conflict over the applicability of the Blue Chip Stamps rationale to civil RICO actions is left unresolved. Because the court of appeals rejected the Blue Chip Stamps rationale, and the issue was addressed in Holmes,

285. Id.
286. Id.
287. Id. at 1325.
288. Id.
289. Justice O'Connor stated that the purchaser-seller limitation in Rule 10b-5 is due to the relationship between section 10(b) of the Securities Exchange Act of 1934 and other provisions of the securities laws. Also, the need for an executed transaction requires a purchaser-seller limitation. Justice O'Connor believed that these issues do not apply to RICO. Id. at 1326.
291. Id. at 1326.
292. Id. at 1327.
293. Id. (quoting United States v. Turkette, 452 U.S. 576, 587 (1981)).
294. Holmes, 112 S. Ct. at 1327.
295. Id.
Justice O'Connor believed the question should have been decided.296 Justice Scalia filed a separate concurring opinion in *Holmes*, in which he agreed with the judgment of the majority. The Justice agreed that the SIPC failed to meet the proximate causation element of RICO.297 However, like Justice O'Connor, Justice Scalia believed that the Court should have resolved the issue of whether the purchaser-seller limitation of Rule 10b-5 applies to RICO claims.298 Like Justice O'Connor, Justice Scalia rejected the application of Rule 10b-5 standing requirements to a section 1964(c) RICO claim; however, he did so for different reasons.299

Justice Scalia's opinion, based on the "zone of interests" theory, agreed that RICO requires proximate cause,300 but he would require a plaintiff to satisfy the "zone of interests" test.301 The "zone of interests" requirement is similar to the proximate causation requirement in that both are "judicial inference[s]" which serve as "a background practice against which Congress legislates."302 Justice Scalia defined the "zone of interests" requirement as a method to determine if "the plaintiff is within the class of persons sought to be benefitted by the provision at issue."303 According to Justice Scalia, section 1964(c)'s "zone of interests" clearly does not include those who were not injured in their business or property by reason of a section 1962 violation.304 However, the Justice believed that the zone of interests did not indubitably include all persons injured.305

The concurring opinions differed because Justice Scalia believed that the same zone of interests and proximate causation elements applied for both criminal and civil provisions of a statute.306 Justice O'Connor distinguished the standing requirements of the criminal

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296. Id.
297. Id.
299. Id.
300. Id. Justice Scalia, however, believed that there was another reason why proximate cause was an element of standing in RICO. The Justice stated that most, if not all, common law courts require a finding of proximate cause as a condition to recover. Id.
301. Id. at 1328. In a footnote, Justice Scalia conceded that proximate cause may be an element of the "zone of interests" test. Id. at 1328 n.1.
302. *Holmes*, 112 S. Ct. at 1328.
303. Id.
304. Id.
305. Id.
306. *Holmes*, 112 S. Ct. at 1328.
provisions of section 10(b) with the civil provisions.\textsuperscript{307} Justice Scalia acknowledged the rule of Blue Chip Stamps which limits the "zone of interests" to purchasers and sellers for Rule 10b-5 actions and stated that the same "zone of interests" applied to the criminal provisions.\textsuperscript{303} The Justice concluded, however, that although the Blue Chip Stamps considerations were appropriate for creating the "zone of interests" for a statute, these factors alone could not restrict a civil RICO claim to purchasers and sellers when there is no "hint" in the statute of intent to do so.\textsuperscript{309}

IV. EVALUATION

The Supreme Court in Holmes v. Securities Investor Protection Corp. had the opportunity to clarify the requirements for standing to sue under section 1964(c) of civil RICO. The Court's inclusion of a proximate causation analysis established a direct injury standard for section 1964(c), thereby restricting civil RICO to victims who have been directly injured. However, the Court left unanswered the question which has created such conflict among the circuit courts: whether a private civil RICO plaintiff, who is neither a purchaser nor a seller of securities and who is therefore precluded from pursuing a securities fraud action under federal securities law, can maintain an action under the RICO statute predicated on securities fraud. Although the Holmes majority left the purchaser-seller limitation issue unresolved, the concurring opinions may have inadvertently left open the door to broaden civil RICO standing to nonpurchasers and nonsellers. The end result of Holmes is that the conflict among the circuits persists, and the standing requirements for civil RICO were restricted in some aspects, yet potentially broadened in others.

A. The Conflict Still Continues

A comparison of the court opinions reveals several areas upon which the circuits disagree. The three major conflict areas are (1) the interpretation of civil RICO's language, (2) the use of discretion to limit an express cause of action, and (3) the possibility of overturning settled law in the securities field. Each of the conflicting rationales of the circuits are reasonable, but a choice must be made as to which rationale Congress intended.

\textsuperscript{307} Id. at 1324 (O'Connor, J., concurring).
\textsuperscript{308} Id. at 1328-29 (Scalia, J., concurring).
\textsuperscript{309} Id. at 1329.
First, RICO’s language has been given both a narrow and broad interpretation by the circuit courts. The Fourth Circuit held that the language “fraud in the sale of securities”\(^\text{310}\) is narrow and, therefore, is limited to purchasers or sellers.\(^\text{311}\) The Ninth Circuit, on the other hand, looked to section 1964(c), which provides the civil remedy, and held that the language is broad and does not include a purchaser-seller limitation.\(^\text{312}\) Each of these circuit courts looked to different provisions in RICO to establish the standing requirements and, as a result, did not come up with the same requirements.

A possible solution to the conflict is found in the language of section 1964(c), which grants the private cause of action. Section 1964(c) does not require a plaintiff to meet any requirements other than those explicit in that particular section. It can be argued that section 1964(c) is ambiguous because of its silence as to whether or not a civil RICO plaintiff has to meet the standing requirements of the predicate acts. However, the section clearly requires nothing other than that which is stated: (1) a violation of section 1962 of RICO, (2) an injury, and (3) a connection between the violation and the injury. The Supreme Court in Sedima stated that congressional silence “cannot override the words of the statute.”\(^\text{313}\) It follows, also, that the circuit courts should be held to the congressional mandate which requires a liberal reading of RICO’s provisions,\(^\text{314}\) including the language “fraud in the sale of securities.”

The second conflicting issue, regarding the source of section 1964(c)’s private cause of action, results from the courts’ desire and inability to limit RICO standing. Because RICO’s language is broad enough to permit wide range use, the statute has been applied to areas beyond which the 91st Congress intended.\(^\text{315}\) A review of the Statement of Findings and Purposes of Organized Crime Control Act of 1970\(^\text{316}\) reveals that RICO was originally intended to fight organized crime. The Supreme Court in Holmes suggested that a liberal construction may not help the remedial purposes for which RICO was

\(^{311}\) International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 152 (4th Cir. 1987). See supra notes 117-22 and accompanying text (discussing Zepkin’s rationale for the narrow interpretation).
\(^{312}\) Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461, 1466 (9th Cir. 1990).
\(^{314}\) See supra text accompanying note 23.
\(^{315}\) See supra note 22 and accompanying text.
\(^{316}\) See supra note 1 and accompanying text.
intended.\textsuperscript{317} Additionally, the Fourth Circuit, in \textit{International Data Bank, Ltd. v. Zepkin}, restricted RICO by using discretion to limit the express cause of action of section 1964(c).\textsuperscript{318}

However, the consistent understanding is that when a cause of action is expressly granted by Congress, the judiciary is powerless to place any restrictions upon it.\textsuperscript{319} The Ninth Circuit has upheld this idea that the judiciary is restricted from curtailing an express cause of action.\textsuperscript{320} In the case of section 1964(c), Congress gave private citizens an express cause of action; therefore, the judiciary should not be permitted to restrict its availability. If Congress did not intend for civil RICO to be available to plaintiffs who could not meet the standing requirements of the predicate acts, then the language of section 1964(c) must be reformed.

The third conflict, which is quite possibly the most difficult issue to overcome, is the potential for overturning established law in the securities field. The purchaser-seller limitation for Rule 10b-5 began in 1952, with the decision in \textit{Birnbaum v. Newport Steel Corp.}\textsuperscript{321} If the purchaser-seller limitation is lifted when a plaintiff brings a securities fraud claim under Civil RICO, not only is he allowed to circumvent securities law but, in addition, he may receive treble damages and a reasonable attorney's fee. The Fourth Circuit has held that Congress, aware of the purchaser-seller limitation, did not intend to overturn settled law and that explicit language would have been used if such a result was intended.\textsuperscript{322}

However, Congress did in fact use explicit language. Section 1964(c) states that a person has standing if he has been injured "by reason of" the alleged violation, in this case, fraud in the sale of securities.\textsuperscript{323} The Ninth Circuit contrasted the express language of section 1964(c) with the language in Rule 10b-5,\textsuperscript{324} which states that the misconduct must be "in connection with the purchase or sale of any security."\textsuperscript{325} Rule 10b-5 may be more specific in that it requires

\begin{itemize}
\item \textsuperscript{317} In \textit{Holmes}, the Court stated its fear "that RICO's remedial purposes would more probably be hobbled than helped by . . . liberal construction." \textit{Holmes}, 112 S. Ct. at 1321.
\item \textsuperscript{318} See supra text accompanying notes 123-25.
\item \textsuperscript{319} See supra note 113 and accompanying text.
\item \textsuperscript{320} See supra notes 108-16 and accompanying text.
\item \textsuperscript{321} 193 F.2d 461 (2d Cir. 1952). See supra notes 92-95 and accompanying text.
\item \textsuperscript{322} See supra text accompanying notes 126-28.
\item \textsuperscript{323} 18 U.S.C. § 1964(c).
\item \textsuperscript{324} \textit{Vigman}, 908 F.2d at 1466.
\item \textsuperscript{325} 17 C.F.R. § 240.10b-5 (1992).
\end{itemize}
a purchaser or seller, but section 1964(c) is explicit and intentionally broad.\textsuperscript{326} According to section 1964(c), a civil RICO plaintiff has to show that the defendant violated a securities law, not that he has standing under securities law. Congress, aware of the \textit{Birnbaum Rule}\textsuperscript{327} and the purchaser-seller requirement of Rule 10b-5 when RICO was enacted, created a more appealing remedy for securities fraud plaintiffs, and in the process, potentially overturned settled securities law.

The conflicts among the circuit courts are intense and are not easily resolved. \textit{Holmes} was an opportunity for the Supreme Court to at least shed some light upon, if not resolve, the conflicting rationales. In reality, however, Justice Souter, writing for the majority, must have found himself between the proverbial rock and a hard place. In order to address and decide the purchaser-seller limitation conflict, Justice Souter would have had to make a choice between two evils. If the Court applied the purchaser-seller limitation, the results would be contrary to judicial and congressional views. First, the judiciary would be improperly imposing limitations on an express cause of action.\textsuperscript{328} Second, the Court's decision would, in fact, make it a requirement that all civil RICO plaintiffs meet the standing requirements of the underlying predicate acts. As Justice O'Connor stated in her concurrence, the racketeering activities listed in section 1961(1) are mostly criminal violations which give standing only to the government. By creating such a barrier, the Court would be going against the theory that the public can be relied upon as private prosecutors.\textsuperscript{329} Third, the Court would be betraying Congress' mandate that RICO be construed liberally. There is no purchaser-seller limitation in section 1964(c). By creating one, the Court would be narrowly curtailing standing to include only plaintiffs who meet the requirements of the predicate acts.

Conversely, if the Court had decided that the purchaser-seller limitation did not apply to civil RICO plaintiffs, the outlook would be no better. Rule 10b-5 would be surpassed by a more easily mountable and economically beneficial statute. A civil RICO plaintiff

\begin{footnotes}
\item[326] See supra note 185.
\item[327] See supra text accompanying notes 92-95.
\item[328] See supra note 113 and text accompanying notes 110-13.
\item[329] In her concurrence, Justice O'Connor stated that "[b]y including a private right of action in RICO, Congress intended to bring 'the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources [were] deemed inadequate.'" \textit{Holmes}, 112 S. Ct. at 1325-26 (quoting \textit{Agency Holding Corp.}, 483 U.S. at 151).
\end{footnotes}
whose claim is based on Rule 10b-5 would not have to meet the purchaser-seller requirement, yet he would still have to allege a direct injury and meet the federal standard for standing.\textsuperscript{330} Civil RICO would allow prevailing plaintiffs who could not satisfy standing under Rule 10b-5 to receive treble damages plus a reasonable attorney's fee. In essence, the Court would be overturning more than forty years of settled securities law. Additionally, as noted in the majority opinion,\textsuperscript{331} by alleviating the obstacles to standing, the dangers of increased litigation arise, for the prospect of being awarded treble damages and a reasonable attorney's fee will undoubtedly attract more litigants. When faced with such a choice, the majority in \textit{Holmes} decided to side-step the issue and base its decision on causation grounds.

Justice Souter, in addressing the conflict among the circuit courts, stated that the conflicting cases could have been resolved on proximate cause grounds.\textsuperscript{332} In other words, there would be no conflict if the circuit courts had first determined whether the plaintiffs had been directly injured by the securities fraud. The plaintiffs in the circuit court cases to which the Supreme Court referred to were not purchasers or sellers of the securities involved.\textsuperscript{333} In each case, the plaintiffs' injuries were caused by the securities fraud alleged; however, the causal connections may be arguable. \textit{Vigman} was reversed by \textit{Holmes} because the injury was not found to be proximately caused by the defendant, and \textit{Zepkin} and \textit{Brannan} both found that the plaintiffs did meet the proximate causation standard. \textit{Warner} remains as the sole case finding proximate cause; however, a review of the case may reveal that, under the new direct injury standard, the plaintiffs had not alleged proximate cause. In effect, Justice Souter is correct that the conflict could be resolved by alleviating the problem of proximate cause.

A question arises regarding whether Justice Souter impliedly stated that unless a plaintiff is a purchaser or seller he will not have standing to bring a civil RICO suit based on Rule 10b-5. If a nonpurchasing or nonselling plaintiff could allege a direct injury resulting from a violation of Rule 10b-5, would the Court find that he had standing? \textit{Holmes} provides no answer. If the plaintiff finds himself in the Ninth

\begin{footnotes}
\item[330] See supra notes 45-48 and accompanying text.
\item[331] See supra note 251 and accompanying text.
\item[332] \textit{Holmes}, 112 S. Ct. at 1321-22.
\item[333] See supra notes 104, 108, 117 & 134 (describing the parties in the circuit court cases).
\end{footnotes}
or Eleventh Circuit, then most likely he will have standing under civil RICO. On the other hand, if the plaintiff finds himself in the Fourth or Eighth Circuits, then he will most likely be denied standing under civil RICO.

B. Effect of Holmes on Civil RICO Standing

A literal reading of section 1964(c) of RICO would seem to require "but for" causation to maintain standing.\textsuperscript{334} However, the decision in Holmes supposedly restricted civil RICO standing by holding that a plaintiff must show that the alleged racketeering activity was the proximate cause of his injury.\textsuperscript{335} The Court claims to have established the proximate causation requirement in the Holmes opinion.\textsuperscript{336} The majority of federal courts, however, have already applied a proximate causation requirement to civil RICO claims.\textsuperscript{337} "Essentially, [Holmes] leaves the status quo."\textsuperscript{338} Therefore, Holmes did not provide any ground-breaking rule as to what type of causation should be applied to civil RICO claims.

Although proximate causation had already been established as the standing requirement applied by the lower courts, Holmes did resolve conflicting definitions of proximate cause. The Seventh and Eleventh Circuits held that a RICO plaintiff could only satisfy the proximate cause requirement if his injuries were directly caused by the alleged racketeering activity.\textsuperscript{339} On the other hand, the Second and Fifth Circuits held that proximate cause includes indirect injuries.

\textsuperscript{334} Holmes, 112 S. Ct. at 1316.
\textsuperscript{335} Id. at 1317-19.
\textsuperscript{336} Id.
\textsuperscript{337} See Pelletier v. Zweifel, 921 F.2d 1465, 1499-500 (11th Cir. 1991) (holding that § 1964(c) of RICO imposes a proximate causation requirement); Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 744 (5th Cir. 1989) (holding that a § 1964(c) plaintiff must prove factual causation and proximate causation); Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir. 1988) (holding that civil RICO is by nature a tort remedy and, therefore, the principle of proximate cause applies); Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985) (holding that the "by reason of" language imposes a proximate cause requirement).
\textsuperscript{338} Victim of Alleged Shareholder Fraud Fails to Show Proximate Cause, 7 Civil RICO REPORT 1 (Apr. 1, 1992) (quoting Michael Goldsmith, a Brigham Young University law professor who teaches a course in RICO).
\textsuperscript{339} See Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991); Haroco, Inc. v. American Nat’l Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), aff’d, 473 U.S. 606 (1985).
as long as they were foreseeable and nonderivative. The Holmes Court, by applying the common law doctrine of proximate cause from the antitrust laws, defined proximate cause as requiring "some direct relation between the injury asserted and the injurious conduct alleged." Therefore, the Court established a black-letter rule for standing which requires that, in order to maintain standing under civil RICO, a plaintiff must show that his injuries were directly and proximately caused by the defendant's alleged racketeering activity. The direct causation requirement is seen as the "high court's first narrowing of available remedies under RICO." 

On the other hand, the Holmes decision may also have broadened the scope of civil RICO standing. Although the majority opinion in Holmes does not supply the lower courts with any guidance regarding the purchaser-seller limitation conflict, the concurring opinions may be helpful to the circuit courts. Four Justices, O'Connor, White, Stevens, and Scalia, declared that the purchaser-seller limitation did not apply to civil RICO claims. In light of the fact that the other five Justices did not express an opinion on the purchaser-seller limitation, there is a high probability that the concurring opinions will be the standard applied by the lower courts. The likelihood that one of the five justices in the Holmes majority will join the concurring opinions if the issue arises again may be enough to convince the lower courts to adopt the rationale of the concurring opinions. In effect, Holmes may have expanded the scope of possible civil RICO plaintiffs whose claims are based on securities fraud, because lower courts may adopt Holmes' concurring opinions and reject the purchaser-seller limitation.

Justice O'Connor's concurring opinion in Holmes contains several practical reasons which may persuade the circuit courts to adopt her rationale and reject the purchaser-seller limitation in civil RICO claims. First, Justice O'Connor points out that the requirement is not in the language of section 1964(c). The focus of section 1964(c) is on the plaintiff's injury, not on the defendant's violation. The second practical

341. Holmes, 112 S. Ct. at 1318.
342. Victim of Alleged Shareholder Fraud Fails to Show Proximate Cause, supra note 338, at 1.
343. See supra text accompanying notes 267 & 299.
345. Id.
point is that by imposing the purchaser-seller limitation, standing is limited in most cases to the government. The civil RICO provision was intended to help prosecutors, not burden them with more responsibilities. The most important and fundamental reason given by Justice O’Connor is that section 1964(c) provides an express cause of action to which the judiciary cannot add limitations. Justice O’Connor’s concurring opinion contributes a sensible rationale for resolving the purchaser-seller limitation conflict, and the circuit courts should follow.

B. Possible Congressional Legislation in Sight

Although the courts may attempt to broaden or restrict civil RICO, the true power to change RICO lies with the legislature. In fact, on April 11, 1991, a bill was introduced in the United States House of Representatives which provided amendments to various sections of RICO, including section 1964(c). 346 The bill “contains gatekeeper requirements that require the Court to first determine whether treble damage[s] ‘clearly serve the public interest and provides appropriate deterrence against the repetition of egregious criminal conduct.’” 347 The bill reflects Congress’ intent to allow the “courts to dismiss civil suits that RICO was never intended to address . . . .” 348 Although Congress seems concerned with limiting RICO, the current bill does not address the issue of who can maintain standing. Nonetheless, hope for passage of RICO legislation is small. The bill has been pending in the House for over a year and there are no RICO amendment bills pending in the Senate.

V. Conclusion

Where does civil RICO stand in light of the decision in Holmes v. Security Investor Protection Corp.? Basically, a plaintiff must now meet a higher standard of causation in order to maintain standing under section 1964(c). This standard, however, is not drastically different from the previous causation element required by the federal courts. The decision that would have made the greatest impact on civil RICO litigation would have been to resolve the circuit courts’ conflict over whether the Rule 10b-5 purchaser-seller limitation applies to section

Adoption of the purchaser-seller limitation would have restricted section 1964(c)'s use, warning Congress that the courts are inflicting judicial discretion on an express cause of action. On the other hand, rejecting the purchaser-seller limitation could have expanded section 1964(c)'s use and set off a siren in Congress that civil RICO's interpretation had gone beyond the intended breadth of the statute. The concurring opinions, however, suggest that given the appropriate fact pattern, the Supreme Court may decide that the purchaser-seller limitation does not apply to civil RICO claims based on Rule 10b-5.

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